IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dasha L. Beckett,	:	
Appellant	:	CIVIL ACTION
	:	
v.	:	NO. 00-5337
	:	
COATESVILLE HOUSING ASSOCIATES, t/d/b/a REGENCY PARK APARTMENTS,	:	
Appellee.	:	

MEMORANDUM AND ORDER

YOHN, J. July , 2001

Dasha L. Beckett ("Beckett" or "debtor" or "tenant") appeals from a final order of the bankruptcy court in favor of Coatesville Housing Associates ("CHA" or "landlord") and against debtor Beckett granting CHA's motion for relief from the automatic stay of bankruptcy. The order authorized CHA to enforce a state court landlord-tenant judgment for possession against Beckett requiring her eviction from a CHA rental property. The parties have set forth three issues for the court's consideration: (1) whether the bankruptcy court erred by according issue preclusive effect to CHA's state court judgment of possession; (2) whether 11 U.S.C. § 365(b) allows Beckett to cure a non-monetary default of her residential lease with CHA and to assume the lease agreement as part of confirmation of her Chapter 13 plan; and (3) whether CHA's judgment of possession constitutes a "claim" within the meaning of 11 U.S.C. § 101(5).[1] After considering Beckett's appeal and reply briefs and the brief in opposition filed by CHA, I

[1]At oral argument, debtor agreed that CHA's judgment of possession is not a claim within the meaning of the bankruptcy code. Nevertheless, debtor contends that such a determination is not needed. I agree. As such, there remain only two issues on appeal.

conclude that the bankruptcy court's order should be affirmed.

I. Factual and Procedural Background

On November 12, 1999, debtor and landlord entered into a lease agreement regarding residential rental property located at 503 Victoria Drive, Coatesville, Pennsylvania. The lease agreement provided for monthly rent to be subsidized by the United States Department of Housing and Urban Development. Paragraph 10 of the lease agreement requires the tenant, *inter alia*, to keep the premises in a "clean, orderly and safe condition." Paragraph 23 of the lease agreement states that the landlord may terminate the agreement for, among other things, "1. the Tenant's material noncompliance with the terms of this Agreement" or for "other good cause." The agreement defines material noncompliance to include "(1) one of more substantial violations of the lease; (2) repeated minor violations of the lease that: (a) disrupt the livability of the project, (b) adversely affect the health or safety of any person . . . [and] (d) have an adverse effect on the project."

On March 8, 2000, CHA brought an action for possession in a Pennsylvania District Court sitting in Chester County, Pennsylvania. CHA argued for possession based upon Beckett's failure to maintain the interior of the premises in a clean, orderly and safe condition, an alleged non-monetary and material default under paragraphs 10.b and 23.b of the lease agreement. A review of CHA's complaint further reveals that the landlord sought only possession of the leased premises and not monetary damages as the alleged breach implicated health and safety issues which did not give rise to a right to payment. After a hearing on March 21, 2000, the state court entered judgment for possession in favor of CHA and against Beckett. This order was not appealed and became final. CHA initiated eviction proceedings against Beckett as authorized by

the state court judgment.[2]

On June 25, 2000, Beckett filed a petition for relief under Chapter 13 of the Bankruptcy Code. In the re-organization plan accompanying debtor's bankruptcy petition, Beckett sought to assume the residential lease agreement pursuant to 11 U.S.C. §§ 365 and 1322(b)(7) and cure the default underlying the pending eviction by proposing to thereafter maintain her premises in a clean, safe and orderly fashion. On August 17, 2000, CHA filed a motion seeking relief from the automatic stay which the bankruptcy court granted at a September 14th hearing. At the hearing, debtor's counsel argued that because Beckett appeared in state court unrepresented, she did not have a full and fair opportunity to litigate CHA's complaint for possession. The bankruptcy judge, however, determined that the argument was precluded because the tenant could have appealed the judgment for possession in state court, but did not. *See* 9/14/00 N.T. at 12-13. Ultimately, the bankruptcy court held that, as a matter of law, Beckett lacked the ability under the bankruptcy code to cure the non-monetary lease violation that resulted in the state court judgment. *See id*. at 21-22. This appeal followed.

---

[2]Rule 514 of the Pennsylvania Rules of District Justices provides that when judgment is rendered with respect to the complaint for possession, notice of the judgment shall be given. Such notice also shall advise the parties of the right to appeal. Under Rule 515, if judgment for possession is entered in favor of the landlord, the landlord "may, after fifteen (15) days after the date of the judgment, file with the district justice a request for an order of possession." Rule 516 requires the district justice to issue the order of possession and deliver it to the sheriff or constable. Rule 517 authorizes the sheriff or constable to serve the order and grants the occupant fifteen (15) days to vacate the premises before the use of force. If the alleged default is based solely on the tenant's failure to pay rent, Rule 518 provides that the tenant may cure the default.

In the instant case, a judgement of possession was rendered in favor of CHA and against Beckett. CHA applied for and was granted an order of possession. Beckett also had been served with that order of possession. Beckett filed her bankruptcy petition just prior to the expiration of the 15 days provided for in Rule 517. Rule 518 is inapplicable as Beckett's alleged default concerned her failure to keep her apartment in a "clean, orderly and safe condition," a health and safety issue that did not give rise to a right to the payment of money damages.

II. Standard of Review

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. *See In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994). A finding of fact is clearly erroneous if a reviewing court has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quotation omitted). Mixed questions of fact and law require a mixed standard of review, under which the court reviews findings of historical or narrative fact for clear error but exercises plenary review over the bankruptcy court's "choice and interpretation of legal precepts and its application of those precepts to the historical facts." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (quotation omitted), *cert. denied, Comm. of Unsecured Creditors v. Mellon Bank, N.A.*, 503 U.S. 937 (1992); *see Chemetron Corp. v. Jones*, 72 F.3d 341, 345 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996). When reviewing a decision that falls within the bankruptcy court's discretionary authority, the district court may only determine whether or not the lower court abused its discretion. *See In re Top Grade Sausage*, 227 F.3d 123, 125 (3d Cir. 2000). "An abuse of discretion exists where the [lower] court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Int'l Union, UAW v. Mack Trucks, Inc.*, 820 F.2d 91, 95 (3d Cir. 1987).

III. Discussion

To determine the preclusive effect of a state court judgment, this court must look to the law of the adjudicating state. *See Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 357 (3d Cir. 1999) (citations omitted). Under Pennsylvania law, issue preclusion applies where the following four

elements are met:

> (1) the issue decided in the prior adjudication was identical with the one presented in the later action; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Id. (citations omitted). Beckett's only argument is that she did not have a full and fair opportunity to litigate because she lacked sophistication and legal representation at the hearing before the Pennsylvania District Justice. Beckett, however, has failed to cite any case law requiring legal representation at a hearing before a district justice. Moreover, the court has not found any. As such, I conclude that the bankruptcy court was correct in its determination that the state court judgment has preclusive effect.

The court must now determine the effect of that state court judgment upon the instant bankruptcy action. By the terms of Beckett's lease agreement with CHA, the landlord could terminate the agreement by showing, *inter alia*, "the Tenant's material noncompliance with the terms of this Agreement" or for "other good cause." In state court, CHA argued that Beckett's failure to keep her apartment in a "clean, orderly and safe condition" constituted such a material breach. Ultimately, the state court entered a judgment of possession in favor of CHA and against Beckett. As such, it found a material breach. Moreover, because the elements of issue preclusion have been satisfied, this court is bound by the state court's determination of materiality. Therefore, I find that the bankruptcy court properly accorded the state court judgment preclusive effect that there has been a material breach of the lease by Beckett for failure to keep her apartment in a "clean, orderly and safe condition."

This leads to the court to determine whether Beckett may now avail herself of section 365

of the bankruptcy code in an attempt to cure her lease default and assume her lease. Section 365 governs a bankruptcy trustee's ability to assume executory contracts and unexpired leases of a debtor. Section 365, in relevant part, provides that:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> (C) provides adequate assurance of future performance under such contract or lease.
> (2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
> (B) the commencement of a case under this title;
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
> (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

Under § 365, the debtor, as the moving party, has the burden of persuasion to establish a right to assume. *See, e.g.*, *In re Vitanza*, No. 98-19611DWS, 1998 WL 808629, at *14 (Bankr. E.D. Pa. Nov. 13, 1998); *In re Mack*, No. 93-13116F, 1993 WL 722255, at *4 (Bankr. E.D. Pa. Nov. 10, 1993). In the instant case, debtor asserts that § 365 affords her the right to assume her lease because she has cured the alleged lease default, *i.e.*, she has cleaned up her apartment, and will continue to maintain her apartment in a "clean, orderly and safe condition." Conversely, CHA argues that the bankruptcy court was correct when it ruled that § 365 does not permit a

debtor to cure non-monetary lease defaults.

Few courts have considered the issue whether § 365 may be used to cure non-monetary defaults and assume a residential lease. Nevertheless, some courts that have considered the issue have determined that § 365 applies both to monetary and non-monetary defaults. *See, e.g., In re Gilmore*, 261 B.R. 175, 180-81 (Bankr. W.D. Pa. 2001) (agreeing that certain non-monetary breaches can be cured); *In re Whitsett*, 163 B.R. 752, 753-55 (Bankr. E.D. Pa. 1994) (finding that non-material, non-monetary breaches of a residential lease do not preclude assumption pursuant to § 365); *In re Yardley*, 77 B.R. 643, 645 (Bankr. M.D. Tenn. 1987) ("It is implicit in the structure of § 365 that Congress contemplated the curing of non-monetary defaults."); *see also In re Claremont Acquisition Corp., Inc*, 113 F.3d 1029, 1033 (9 th Cir. 1997) (stating that all defaults, both monetary and non-monetary, must be cured before a lease can be assumed under § 365); *In re Ruffin*, No. 91-14195S, 1991 WL 173331, at *1 (Bankr. E.D. Pa. Sept. 6, 1991) (permitting, under § 365, the cure of a non-monetary breach). A number of courts in this circuit, however, have limited a debtor's ability to assume a lease to those cases where the non-monetary breaches were not material, on the basis that material breaches could not be cured. *See generally, e.g., In re Gilmore,* 261 B.R. at 180-81 (stating that debtor can cure "certain" non-monetary breaches and that, for example, satisfaction of criminal penalties cannot cure the civil consequences of that criminal breach); *In re Sweeney*, 215 B.R. 97, 103 (Bankr. E.D. Pa. 1997) (citing *In re Whitsett* and finding that debtor's failure to report her income or the residency status of her husband and two oldest children were not sufficiently material to support the termination of debtor's Section 8 leasing benefits); *In re Whitsett*, 163 B.R. at 753-55 (permitting cure and assumption because the debtor's failure to promptly report a change in income relevant to her

Section 8 housing benefits was not sufficiently material).

In support of its position that non-monetary breaches cannot be cured under section 365, CHA relies heavily on *In re Mack*. In *Mack*, the Philadelphia Housing Authority ("PHA") sought relief from the automatic stay in order to commence eviction proceedings against the debtor. PHA sought to evict the debtor due to an alleged non-monetary breach of her lease: the sale of drugs from her apartment by her nephew. *See In re Mack*, 1993 WL 722255, at *1. After acknowledging that "[a] number of courts have held that a debtor has the right under section 365(b) to cure non-monetary defaults as well as monetary defaults," the bankruptcy court in *Mack* held that "[i]f the non-monetary default creates a 'claim', so that it may be cured by payment of money, section 365(b) permits the debtor to assume the lease." *Id*. at *6, 7. *Cf. In re Gilmore*, 261 B.R. at 180 (interpreting *Mack* as holding that cures of non-monetary breaches are permitted but that the state court is the proper forum to consider the issue).

The *Mack* court, observing that statutory construction is a "holistic endeavor," looked to other sections of the bankruptcy code to inform its interpretation of section 365. Specifically, the court noted that section 524 enjoins the collection or recovery of a discharged debt. Moreover, the court continued, the code defines a "debt" as a liability on a "claim," which the code in turn defines to include the "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment . . . ." *See id.* at *7 (citing 11 U.S.C. § 101(12), (5)(B)). As such, the court concluded that if there is no right to payment, then a debtor may not cure under section 365(b). *See id.* In other words, despite the fact that section 365 makes no mention of a "claim," and only speaks to lease and executory contract "defaults," the *Mack* court nevertheless required that the defaults constitute a claim under the code before section 365 could apply.

Besides the court's effort to construe the code holistically, it appears that the *Mack* court's decision was influenced by a greater public policy: to prevent debtors from using the bankruptcy code "to free them from non-monetary obligations imposed by agreements or by state court orders." *Id*. Debtor attempts to distinguish her case on the ground that she is not attempting to discharge her lease obligation, but is, in fact, seeking to assume said obligations. Debtor's argument, however, misses the point of this policy argument. Debtor *is* attempting to use the bankruptcy code to escape a state court judgment of possession based upon her failure to live up to her non-monetary obligations under the lease, and her ultimate eviction.

In any event, after reviewing the bankruptcy code and the limited case law interpreting section 365, I am persuaded that section 365 permits the cure of some non-monetary residential lease defaults, even if they do not constitute a "claim" under the code. It is clear on the face of the statute that Congress intended § 365 to apply to non-monetary defaults. Section 365(a) begins with a bankruptcy trustee's general power to assume or reject an unexpired lease. Subsection (b)(1) then conditions that right to assume on a prompt cure or adequate assurance thereof. Nowhere in this section does Congress assign this right exclusively to monetary defaults. Moreover, elsewhere in section 365, Congress determined that a trustee need not cure certain non-monetary defaults, such as a default relating to insolvency. *See In re Yardley*, 77 B.R. at 645 (citing 11 U.S.C. § 365(b)(2)) (additional citations omitted). If Congress intended that all non-monetary defaults be incurable under section 365, subsection (b)(2) would be rendered superfluous. As such, I conclude that Congress intended section 365 to apply both to monetary and non-monetary defaults.

Nevertheless, I am also cognizant of the public policy argument acknowledged by the

bankruptcy court in *Mack*. Indeed, it is likely that the *Mack* court was not the only court considering this issue to recognize that bankruptcy law is not intended to be used to escape the implications of state court judgments. Perhaps this is one reason several courts have determined that material non-monetary defaults cannot be cured under section 365. *See generally, e.g., In re Gilmore*, 261 B.R. at 180-81; *In re Sweeney*, 215 B.R. at 103; *In re Whitsett*, 163 B.R. at 753-55. In any event, I am persuaded that the equities surrounding this issue require this result. Accordingly, I conclude that material breaches of a non-monetary nature are not curable under § 365. Moreover, because the state court has already found Beckett's non-monetary breach to be material, her default is incurable under section 365 so that although section 365 applies, Beckett cannot meet the requirements of § 365(b)(1)(A). Therefore, the bankruptcy court's decision to lift the automatic stay so that CHA may proceed to enforce its order of possession against Beckett will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dasha L. Beckett,	:	
Appellant	:	CIVIL ACTION
	:	
v.	:	NO. 00-5337
	:	
COATESVILLE HOUSING ASSOCIATES,	:	
t/d/b/a REGENCY PARK APARTMENTS,	:	
Appellee.	:	

ORDER

YOHN, J. July , 2001

AND NOW, this day of July, 2001, upon consideration of appellant, Dasha L. Beckett's, appeal and reply briefs (Doc. Nos. 3, 5) and Coatesville Housing Associate's brief in opposition thereto (Doc. No. 4), IT IS HEREBY ORDERED that the bankruptcy court's Order dated September 14, 2000 is AFFIRMED.

_____
William H. Yohn, Jr., Judge